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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1950
No. 489

BOARD OF ZONING APPEALS OF THE TOWN OF HEMPSTEAD and ROBERT C. RICHTER, CHARLES G. KANE, WALTER G. MICHAELIS, W. KENNETH CHAVE and CHARLES B. GREGORY, the Members thereof,

and

RICHARD W. BARNES,

Petitioners,

against

SUSAN H. CLARK, NATHAN H. CHERWIN, WALTER E. SWANSEN, RUTH SWANSEN, MIRIAM R. PHILLIPS, JOHN E. HAHN, DOROTHY HAHN, MICHAEL LIEBL and MABEL LIEBL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

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Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Board of Zoning Appeals of the Town of Hempstead, Nassau County, New York State, and the individual members of the said Board, together with Richard W. Barnes, hereby petition for a writ of certiorari to review a final decision made May 25, 1950, by the Court of Appeals, the last resort of all causes of the State of New York; and an order made by the said Court of Appeals on October 5, 1950.

The aforesaid decision by a divided Court reversed an order of the Appellate Division of the Supreme Court in

the Second Department, which unanimously affirmed an order of the Supreme Court at Special Term (Froessel, J.) affirming the determination of the Board of Zoning Appeals of the Town of Hempstead (Nassau County, New York), and granting the petitioner, Richard W. Barnes, a variance of the building zone ordinance, so as to permit the erection of a combined residence and funeral home in an area zoned "B-Residence District". By order of October 5, 1950, the Court of Appeals denied petitioners' motion for reargument of the cause, or in the alternative, to amend the remittitur, so as to make it appear whether or not a federal question was necessarily decided.

Statement

The petitioner, Richard W. Barnes, is the owner of a vacant lot 100 feet wide on the west side of Westminster Road, in a section of the Town of Hempstead, Nassau County, New York, known as Cathedral Gardens. When he purchased the lot in 1945, it was and still remains in a "B-Residence Zone". On August 18, 1948, Mr. Barnes asked the Board of Zoning Appeals of the Town of Hempstead for a variance to permit him to build a combined residence and funeral home—a non-conforming use—on his lot. Under the building zone ordinances, the permitted uses in B-Residence Zones are: single residences, club houses, schools, churches, professional offices and dwellings, and some others; but not funeral homes. Section 267 of the Town Law empowers the Board to vary the application of town zoning ordinances "where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance * * * ".

From the proof adduced at the hearing before the Board and the Board's personal inspection of the premises and surrounding neighborhood, certain undisputed facts were established:

The proposed funeral home would be located within 300 feet of the six lane highly trafficked Hempstead Turnpike, a State highway running east and west and zoned for business for a depth of 100 feet. There are gasoline service stations on both of the northerly corners of the intersection of Westminster Road and Hempstead Turnpike. Opposite the Barnes' lot, on the east side of Westminster Road for about 600 feet north from the gas station on the Turnpike, the property is owned by a church corporation and on it there is a church, a rectory, and a parochial school. The parochial school was concededly built after the variance was granted. At the time of the hearing, the land was devoted to a public parking lot—a non-conforming use. Father Smith, speaking for the church corporation, favored the granting of the variance.

The lot to the west of the Barnes' property was vacant and the owner did not object to the variance. Neither did Dr. McKenna, the owner of the property immediately to the north of Barnes. Dr. Cherwin, whose home and professional office is across Regent Place to the south of the Barnes' property, was the only adjacent owner objecting. The objectants Liebl, who represented the property to the north of Dr. McKenna on the northwest corner of College Place and Westminster Road, have concededly since the hearing sold their property to the church, and it is now a convent. Thus, Mr. Barnes finds himself in the unique position of being flanked on both sides by physicians' offices and virtually surrounded by the institutional buildings, with the congested business area in close proximity. It was the opinion of the Board of Zoning Appeals, as expressed in the affidavit of Mr. Walter G. Michaelis annexed to its return at Special Term of the Supreme Court, that Barnes' position "because of this exceptional environment, was unique and that his property did suffer hardship and that a variance would not damage or depreciate the value of the existing surrounding property."

The decision of the Court of Appeals in this case was a final determination of a present justiciable controversy. It conflicts with the decision of the United States Supreme Court in the case of *Nectow* v. *Cambridge,* 277 U. S. 183, and by substituting its judgment in place of the authority to exercise reasonable discretion granted to the Board of Zoning Appeals by the laws of the State of New York, the said Court of Appeals in effect seriously and injuriously invaded the property rights of petitioner Barnes, so that its action comes within the ban of the Fourteenth Amendment to the Constitution of the United States. It is from this decision, annulling the determination of the Board of Zoning Appeals, that the petitioners come praying for a writ of certiorari.

Jurisdiction

The action of the Court of Appeals comes within the ban of the Fourteenth Amendment to the Constitution of the United States and constitutes a serious and injurious invasion of the property rights of the petitioner Barnes, and as such, is reviewable by this Honorable Court. This Court in the *Nectow* case, *supra,* in *Euclid* v. *Ambler Co.,* 272 U. S. 365, in *Zahn* v. *Board of Public Works,* 274 U. S. 325, and in many other cases, has held a zoning right to be a right in property, the unwarranted invasion of which comes within the ban of the Fourteenth Amendment.

The petitioner Barnes, having been the successful party at all of the stages of the litigation herein, from its inception before the Board of Zoning Appeals until it reached the Court of Appeals, did not specifically raise the constitutional question in the lower Courts. The petitioners did however, at Special Term, in the Appellate Division and in the Court of Appeals, by briefs and arguments, indicate that they were relying on the authority of *Nectow* v. *Cambridge, supra.* Indeed, the decision of Mr. Justice

Froessel at Special Term and the dissenting opinion in the Court of Appeals, both cite the *Nectow* case. After the Court of Appeals had by a divided Court reversed the Courts below and annulled the determination of the Board of Zoning Appeals, the petitioners on the motion for reargument or alternative relief specifically raised a federal question in the Court of Appeals, setting forth in their brief, "The restricted use to residence 'B' purposes was tantamount to a deprivation of substantial property rights in his land and prohibited by the Fourteenth Amendment to the Federal Constitution." The Court of Appeals passed on this question by denying petitioners' motion without opinion.

Reasons for Issuance of Writ

The determination of the Court of Appeals of the State of New York has decided an important question of law affecting the property rights of the petitioner Barnes and affecting the duties and powers of the Board of Zoning Appeals of the Town of Hempstead, in a manner repugnant to and violative of the applicable provisions of the Constitution of the United States; contrary to the decisions of this Honorable Court; and contrary to the provisions of the law of the State of New York; by substituting its own findings of fact for the facts as found on ample proof by the Board of Zoning Appeals.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of New York, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and of the proceedings of the said Court of Appeals, and that the final decision made by the

said Court and the order denying leave to reargue the said final decision be reversed by this Honorable Court, and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated, New York, January 9, 1951.

BOARD OF ZONING APPEALS OF THE TOWN OF HEMPSTEAD and ROBERT C. RICHTER, CHARLES G. KANE WALTER G. MICHAELIS, W. KENNETH CHAVE and CHARLES B. GREGORY, the Members thereof,

and

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By LOUIS A. D'AGOSTO,
Counsel for Petitioners.

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Respondents.

BRIEF IN SUPPORT OF PETITION

1. Opinions of the Courts Below

The opinion of Mr. Justice Froessel, affirming the determination of the Board of Zoning Appeals at Special Term of the Supreme Court, is found on pages 124 through 128 of the "Papers on Appeal" in the Court of Appeals of the State of New York.

The majority and dissenting opinions in the Court of Appeals are reported in 301 N. Y. 86.

2. Jurisdiction and Statement of the Case

The jurisdictional basis for the petition and the statement of the case are found in the petition herein, and for the sake of brevity are not fully repeated here. The petitioners wish, however, to point out certain inconsistencies in the majority opinion.

The majority opinion reads at one point, "Nevertheless, intervener Barnes purchased the lot, then applied for a variance. We could end this opinion at this point by saying that one who thus knowingly acquires land for a prohibited use, cannot thereafter have a variance on the ground of 'special hardship' (*Matter of Steers* v. *Rembaugh,* 259 App. Div. 908, 909, affd. 284 N. Y. 621)."

Obviously, the Court failed to take into consideration that three years had elapsed between the time when Mr. Barnes acquired the property and the time when his application was made. During these three years, many changes affecting zoning rights had occurred in the fast growing Town of Hempstead. Indeed, during the pendency of this litigation, as was conceded upon the argument in the Court of Appeals, the non-conforming parking lot across Westminster Road from the Barnes' property had been replaced by a parochial school, and the property of the objectors Liebl had been sold to the church corporation and was now used as a convent.

The majority opinion at another point states; "• • • it was not claimed that any effort had been made to sell the premises for any of the authorized uses." This conclusion of fact by the Court of Appeals disregards entirely the testimony given before the Board of Zoning Appeals by the objectors' witness, Robert L. Smith, a real estate broker (page 81 of the record), who on cross-examination admitted that the property was listed with him and that he never had a prospect interested in it.

3. The Question Presented

Did the Court of Appeals, by annulling the determination of the Board of Zoning Appeals, interfere with and substitute its judgment for that of the administrative Board charged with the duty of making a determination, in violation of Section 267 of the Town Law of the State of New York, and contrary to the decision in *Nectow* v. *Cambridge*, 277 U. S. 183; thereby depriving the petitioner Barnes of valuable property rights, in contravention of the Fourteenth Amendment to the Constitution of the United States?

4. ARGUMENT

POINT A

The Court below erred in reversing the determination of the Board of Zoning appeals.

The law is well settled that in order to annul the determination of the Zoning Board, the Court must find that the granting of a variance was arbitrary, capricious, and an abuse of discretion. There was nothing in the record in this case to warrant such a finding. As the minority opinion in the Court of Appeals points out:

> "It is axiomatic and no longer open to doubt that where there is evidence to constitute a reasonable basis for the determination the court has no right to interfere and substitute its judgment for that of the administrative board charged with the duty of making a determination (*People ex rel. Hudson-Harlem Co.* v. *Walker*, 282 N. Y. 400; *Matter of Rubel Corp.* v. *Murdock*, 255 App. Div. 224, affd. 280 N. Y. 839; *People ex rel. Sullivan* v. *McLaughlin*, 266

N. Y. 519; *Nectow* v. *Cambridge,* 277 U. S. 183; *People ex rel. St. Albans-S. Corp.* v. *Connell,* 257 N. Y. 73)."

POINT B

The petitioner Barnes met all of the essential requirements of the law to sustain the granting of the variance.

The proof submitted before the Board showed that the land in question could not yield a reasonable return if used only for the allowable purposes; that the required variance would not alter the essential character of the locality; and that the plight of the owner was due to unique circumstances and not to a general condition in the neighborhood, which might reflect the unreasonableness of the zoning ordinance itself. It was only as to this third element of proof that there was any real difference between the majority and the minority of the Court of Appeals. The evidence on this point is fully reviewed in the minority opinion. In addition, the return of the Board at Special Term indicated that a committee of the Board had examined the property and the surrounding area, and based on its examination and the consideration of the testimony adduced at the hearing, reached the opinion that Mr. Barnes' position "was unique and that his property did suffer hardship and that a variance would not damage nor depreciate the value of the existing surrounding property" (page 99 of the record).

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its Appellate Jurisdiction, and that to such end a writ of certiorari should issue.

Dated, New York, New York, January 9, 1951.

Respectfully submitted,

LOUIS A. D'AGOSTO,
Counsel for Petitioners.

APPENDIX

The Statutes Involved

BUILDING ZONE ORDINANCE, TOWN OF HEMPSTEAD

ARTICLE 5

B RESIDENCE DISTRICTS (B)

Sec. B-1.0. In a B Residence District the following regulations shall apply:

A building may be erected, altered or used, and a lot or premises may be used for any of the following purposes and for no other:

B-1.1. Single family detached dwelling.

B-1.2. Club, Fraternity House or Lodge, when authorized as a special exception by the Board of Appeals.

B-1.3. A regularly organized institution of learning approved by the State Board of Regents; religious use; or philanthropic use when authorized as a special exception by the Board of Appeals.

B-1.4. Hospital, Sanitarium, Telephone Exchange or Golf Course when authorized as a special exception by the Board of Appeals.

B-1.5. Agriculture or Nursery, provided there is no display for commercial purposes or advertisement on the premises; Municipal Recreational Use; Railway Passenger Station.

B-1.6. Accessory use on the same lot with and customarily incidental to any of the above permitted uses, including a private garage. This shall be understood to include the professional office or studio of a doctor, dentist, mas-

seur, teacher, artist, architect, engineer, musician or lawyer, or rooms used for home occupations such as dressmaking, millinery or similar handicrafts; PROVIDED the office, studio or occupational room is located in the dwelling in which the practitioner resides, and PROVIDED further, no goods are publicly displayed on the premises. Such accessory use, exclusive of a private garage, shall not include the erection or maintenance hereafter of any structure other than one erected on the ground and not exceeding two hundred fifty (250) cubic feet content unless authorized as a special exception by the Board of Appeals.

B-1.7. Signs. Such signs which are authorized under the provisions of Article 10.

CONSTITUTION OF THE UNITED STATES
FOURTEENTH AMENDMENT

"Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

TOWN LAW OF THE STATE OF NEW YORK,
SECTION 267

"* * * Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinances, the board of appeals shall have the power in passing upon appeals, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures, or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done."

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Repondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioner Barnes applied to the Board of Zoning Appeals of the Town of Hempstead for a variance of the zoning ordinances to permit him to erect a funeral parlor in a residentially zoned area which prohibited such use.

The power to grant such variance is given to the Board by virtue of Section 267 of the Town Law and is limited to those cases in which there exists "practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinances—so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done." The Board granted the variance and the Court of Appeals reversed such finding on the ground that petitioner had failed to establish unnecessary hardship and practical difficulties peculiar to himself, as required by the statute and decisions interpreting the same.

Comments on Petitioners' Summary Statement

The petition states that, in close proximity to the Barnes' property, there is located a church, rectory, school, convent and the homes of two physicians. These are all residential B conforming uses under the ordinance.

The remainder of the property completely surrounding the Barnes' property also zoned residential B is improved with owner occupied one-family homes of the better type and there is no non-conforming use in the entire section known as Cathedral Gardens. R. 78.

Upon the hearing before the Board of Zoning Appeals, 238 property owners in the immediate community objected to the granting of the variance. R. 109. Only one resident, the pastor of the local church, spoke in its favor.

The majority of the real estate experts, produced on both sides, admitted that the erection of an undertaking establishment would adversely affect the value of surrounding property. R. 51, 64, 65, 79, 80.

The property immediately to the west, the owner of which was referred to as not objecting, has since been improved by the erection of a conforming one-family residence.

POINT I

There was not drawn in question the validity of any statute, nor was any federal question raised or decided.

No constitutional question was raised in the entire proceeding up to final judgment and determination in the Court of Appeals. Thereafter, the petitioners made a motion for a rehearing, or, in the alternative, for the amendment of the remittitur to show whether or not a constitutional question was necessarily decided. This motion was denied without opinion. R. 153. Nowhere in the record does it appear that the petitioners challenged the validity of a statute or maintained that the denial of a variance would deprive Barnes of property rights in contravention of the Fourteenth Amendment. The attempt to raise this question on a motion for a rehearing came too late. *Gelkon Realty Corporation* v. *Young Women's Hebrew Association*, 296 U. S. 537; *Rooker* v. *Fidelity Trust Company*, 261 U. S. 1114; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179; *St. Louis and San Francisco Railroad Co.* v. *Sheperd*, 240 U. S. 240.

POINT II

The petitioner, Barnes, failed to meet the requirements necessary to obtain a variance and the Court below properly reversed the determination of the Board of Zoning Appeals.

The entire issue related to whether or not the petitioner, Barnes, had proved the necessary grounds upon which a variance could be granted by the Board, in accordance with the requirements of the statutes and decisions of the State of New York. In the prevailing opinion, it is stated that the basis for the Court's findings was the failure of petitioner, Barnes, to establish practical difficulties and unnecessary hardship, special and peculiar to himself.

The petitioners rest their application for a writ on the case of *Nectow* v. *Cambridge*, 277 U. S. 183, cited in the court below only as an authority in support of the contention that the Court could not substitute its judgment for that of the local board. This question became academic when the Court of Appeals held that there was insufficient evidence under the statutory requirements to constitute a basis for an affirmative determination.

The *Nectow* case, *supra*, involved the validity of an ordinance which had been passed on in the courts below. There the zoning ordinance was enacted while Nector was the owner of the property and the line, excluding his property from the unrestricted area, was irregular and appeared from the map to be discriminatory. The facts in the present case were quite different. Barnes acquired the property long after the

enactment of the ordinance. The separation of the business from the residential area was regular and uniform and according to a definite plan which zoned property on Hempstead Turnpike for business use and extended such area back 100 feet. Barnes' property was not even adjacent to the business area but 70 feet back in the residential zone.

CONCLUSION

The petition itself and the foregoing respondents' brief both show that the case presented makes no ground for the isssuance of a writ of certiorari. It is respectfully submitted that the petition should be dismissed.

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